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Nos. 07-588, 07-589 and 07-597

In the Supreme Court of the United States

ENTERGY CORPORATION, *Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*, *Respondents.*

PSEG FOSSIL LLC, *ET AL.*, *Petitioners,*

v.

RIVERKEEPER, INC., *ET AL.*, *Respondents.*

UTILITY WATER ACT GROUP, *Petitioner,*

v.

RIVERKEEPER, INC., *ET AL.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR ENVIRONMENT AMERICA AND THE CENTER FOR BIOLOGICAL DIVERSITY AS AMICI CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether Section 316(b) of the Clean Water Act authorizes the Environmental Protection Agency to compare costs with benefits in determining the "best technology available for minimizing adverse environmental impact" at cooling water intake structures.

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INTEREST OF AMICI

The amici joining this brief ("the Environmental Amici") are groups with considerable experience advocating for positions that will help to achieve Congress's goals in enacting the Clean Water Act ("CWA").[1] Section 316(b) of the Act regulates cooling water intake structures, which are commonly used by power plants and other large facilities.[2] Cooling water intake structures kill fish and large aquatic animals by trapping them against grills or screens, which is known as "impingement," and kill smaller creatures by drawing them into the cooling mechanism, which is known as "entrainment." Section 316(b) requires cooling water intake structures to use the "best technology available for minimizing adverse environmental impact" ("BTA"), and directs EPA to include BTA requirements in the pollution discharge standards it issues under sections 301 and 306 of the Act. Although the best guide to the meaning of the BTA standard is the language used by Congress in section 316(b), the plain meaning of that language is supported by the meaning of similar phrases in sections 301 and 306 – particularly "best available technology" ("BAT") in section 301(b)(2)(A) and "best available demonstrated control technology" ("BADT") in

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[1] Petitioners and respondents other than EPA have filed letters with the Court consenting to the filing of amicus briefs in this case, and EPA has consented to the filing of this brief. No one other than counsel for amici wrote this brief, in whole or in part, and no one made a monetary contribution to its preparation.

[2] Throughout this brief, we refer to the relevant statutory provisions by their Clean Water Act section number. The corresponding U.S. Code section number may be found in the Table of Authorities.

section 306(a)(1).[3]

The Environmental Amici submit this brief primarily to rebut inaccurate arguments advanced by one petitioner and two amici concerning the BAT and BADT standards. *See, e.g.*, Entergy Br. 38-42 ("Sections 301 And 306 Either Mandate Or Permit Cost-Benefit Analysis"); NAHB Br. 14-20; American Chemistry Council *et al.* ("ACC") Br. 22-26. In particular, contrary to their contentions, this Court concluded in *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64 (1980), that EPA may not use a cost-benefit analysis when establishing BAT standards. While Entergy claims that the Second Circuit's decision in this case "rests in part on a misreading" of *National Crushed Stone*, Entergy Br. 41, it is Entergy and its amici rather than the Second Circuit that have misread that decision.

The Environmental Amici fully support the position of respondents Riverkeeper, Inc. *et al.*, that a cost-benefit analysis is impermissible under the BTA standard of section 316(b). The Environmental Amici also agree that a proper understanding of the BAT and BADT standards in sections 301 and 306

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[3] The National Association of Home Builders ("NAHB"), an amicus supporting petitioners, helpfully included a chart in its brief (at pages 10-11) that catalogues the relevant standards by acronym – in addition to BTA, BAT, and BADT, the statute refers to the "best practicable control technology currently available" ("BPT") and the "best conventional pollution control technology" ("BCT"). The chart also provides references to the key statutory provisions relating to each standard. (There is one error: the entry regarding the CWA provision establishing the BCT standard erroneously cites section 304(b)(2)(E) rather than section 301(b)(2)(E)). The statutory provisions are set forth in the addendum to the brief filed by petitioners Entergy Corp., *et al.*

supports that conclusion. Further, Environmental Amici believe that an examination of the section 301 and 306 standards demonstrates that Congress did not, as petitioners argue, intend the BTA standard to be implemented on a site-by-site basis. *See* Entergy Br. 46-47; Utility Water Act Group ("UWAG") Br. 50.

But whatever the Court decides concerning the BTA standard, this Court should not accept Entergy's invitation to rewrite the law governing the BAT and BADT standards, which require an inquiry into costs but do not permit the use of a cost-benefit analysis. Entergy's revisionist interpretation of the BAT and BADT standards is at odds not only with the language, structure, and history of sections 301, 304, and 306, but also with the clearly articulated goals of the Act.

INTRODUCTION

Contrary to the impression given by petitioners and their amici, the issue in this case is not whether EPA may consider the costs of implementation in setting standards under section 316(b) of the Clean Water Act. It may and it should.

Petitioners and their amici contend, however, that EPA ought to conduct a cost-benefit analysis – that the agency ought to consider costs in relation to water quality benefits – and that it should base its section 316(b) decision-making on the results. They advance two versions of such an analysis. Petitioners appear to favor the stricter version, which would require that all costs and benefits be monetized and reduced to present value, and would permit requirements designed to reduce environmental damage only when the resulting dollar value of the

benefits outweighs the dollar value of the costs. In our view, neither section 316(b) nor any other provision of the Clean Water Act authorizes this strict cost-benefit approach as a means of setting technology-based standards. The other version of cost-benefit analysis permits the use of technology that is not the best at reducing pollutant discharge only where the cost of such technology is "wholly out of proportion" to the marginal level of reduction that would be achieved by its use. 118 Cong. Rec. 33,696 (1972), *quoted in E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129 (1977), and *National Crushed Stone*, 449 U.S. at 71 n.10. Senator Muskie described this approach as a "'limited cost-benefit analysis'" in a passage twice quoted by this Court. *Id.* The Clean Water Act's BPT and BCT standards – which, as further set forth below, are different from the other standards in critical ways – require the application of a limited form of cost-benefit analysis.[4]

Petitioners' focus on cost-benefit analysis is misplaced in this case, which concerns only the BTA standard of section 316(b). That provision, like the BAT and BADT standards, calls for a cost *feasibility* analysis rather than cost-benefit analysis. As this Court noted in *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 509-10 (1981), a cost-benefit approach is fundamentally inconsistent with a feasibility approach. Under a cost feasibility analysis, EPA must determine whether the costs of

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[4] In the quoted passage, Senator Muskie was describing the BPT standard. The BCT standard, the statutory delineation of which is similar to that of the BPT standard regarding comparison of costs and benefits, was added in the 1977 Clean Water Act Amendments. Senator Muskie's explanation of the reason for that addition is addressed below.

reducing or eliminating pollution to the degree produced by the best technology available "can be 'reasonably borne' by the industry." Pet. App. 26a;[5] *see also Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 262 (5th Cir. 1989) (same). As the Second Circuit explained, a technology that cannot be reasonably borne by the industry "is not 'available' in any meaningful sense." Pet. App. 24a.

The Second Circuit also concluded that EPA may engage in a "cost-effectiveness analysis" in applying the BTA standard. *Id.* at 26a. Relying on guidance issued by the Office of Management and Budget, the court described a cost-effectiveness analysis as "'[a] systematic quantitative method for comparing the costs of alternative means of achieving the same stream of benefits or a given objective.'" *Id.* at 23a n.10, *quoting* OMB Circular A-94, *Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs*, Appendix A (1992). Although petitioners and their amici belittle the cost-effectiveness approach, it is an inherent component of the federal regulatory program for environmental protection. Most environmental standards – like the cooling water intake standards at issue in this case – are what are commonly known as "performance" standards. They specify a performance goal (such as a maximum allowable level of a particular pollutant discharge), but do not specify a particular means for attaining that goal. The regulated entity thus is free to employ the most cost-effective (the cheapest) means of meeting the standard.

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[5] "Pet. App." citations are to the appendix filed by petitioner Entergy Corporation in No. 07-588.

While the Second Circuit concluded that EPA may properly consider both cost effectiveness and cost feasibility under section 316(b), the court held that this provision prohibits EPA from conducting a cost-benefit analysis. The Second Circuit rested that conclusion in part on this Court's construction of the BAT and BPT standards in *National Crushed Stone*. In that case, this Court addressed both the BPT standard that the Clean Water Act required polluters to meet by 1977, and the more environmentally protective BAT standard that applied beginning in 1987.[6] Relying on the statement of Senator Muskie, "the principal Senate sponsor of the Act," the Court concluded that the more lenient BPT standard called for a "'limited cost-benefit analysis'" to determine whether an "'additional degree of effluent reduction is wholly out of proportion to the costs of achieving such marginal level of reduction.'"[7] 449 U.S. at 71 n.10, *quoting* 118 Cong. Rec. 33,696. The Court also held that, once the stricter BAT standard took effect, "total cost is no longer to be considered in comparison to effluent

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[6] The 1972 Act set a 1983 deadline for implementation of the BAT standards. This was extended from 1984 to 1987 (depending on the circumstances) in the 1977 Clean Water Act Amendments, and the Court cited the 1987 deadline in *National Crushed Stone*. The BAT deadline was later extended to 1989 in the 1987 amendments to the Act.

[7] This cost-benefit comparison is "limited" not only because it employs a "wholly disproportionate" test, but also because the benefit component is not the level of environmental improvement attained through the pollutant reduction (or the level of societal benefits that flow from that improvement), but rather simply the level of pollutant reduction itself. In other words, Congress made the policy determination that any appreciable level of pollution reduction would be beneficial. As discussed below, consideration of water quality benefits is not a factor in setting the Act's technology-based effluent standards.

reduction benefits." 449 U.S. at 71. The Court concluded that the more environmentally protective BAT standard does not contemplate consideration of costs "in relation to effluent reduction," *id.* at 71 n.10, but rather contemplates "'eliminating the discharge of all pollutants'" if it is feasible to do so, *id.* at 75 n.14, *quoting* section 301(b)(2)(A).

The Second Circuit concluded that the BTA standard at issue in this case is more similar to the BAT standard than it is to the BPT standard, both because "best technology available" is linguistically very similar to "best available technology" and because section 316(b) does not reference any comparison of costs and benefits. Pet. App. 29a-31a. "[B]ecause 'Congress itself defined the basic relationship between costs and benefits,'" the Second Circuit concluded that EPA is not permitted to perform a cost-benefit analysis under section 316(b). *Id.* at 24a-25a, *quoting American Textile,* 452 U.S. at 509.

SUMMARY OF ARGUMENT

As respondent Riverkeeper has explained, the Second Circuit correctly concluded that a cost-benefit analysis is not permissible under section 316(b). But whatever this Court concludes concerning section 316(b), it should not rewrite the settled law that the BAT and BADT standards do not permit the use of cost-benefit analysis. In addition, there is no merit to petitioners' contention that CWA standards should be established on a case-by-case basis rather than by means of categorical regulations. While leaving room for variances in certain circumstances, Congress mandated principal reliance on rules of general applicability. Finally, there is ample room to avoid

the absurd hypothetical results trotted out by petitioners and their amici. Congress did not require costly expenditures to achieve truly *de minimis* benefits.

ARGUMENT

The Evironmental Amici disagree with the bulk of the arguments presented by the Solicitor General, petitioner UWAG, petitioner Entergy, and their amici. However, while the arguments presented by the Solicitor General, UWAG, and most of the amici are largely limited to advancing an erroneous interpretation of section 316(b), Entergy and two amici ask the Court to engage in a far more dangerous overreaching that would undermine not only the regulation of cooling water intake at issue in this case, but also the regulation of a wide variety of potentially deadly pollutants.

The Solicitor General acknowledges *National Crushed Stone* and "[a]ssum[es] for the sake of argument that cost-benefit analysis is not one of the other factors that EPA may consider in determining BAT." EPA Br. 24. According to the Solicitor General, however, this Court may nevertheless conclude that a cost-benefit analysis is permissible under section 316(b), because section 316 "governs the *intake* of water, as opposed to the *discharge* of pollutants," and pollutants are a more serious problem. *Id.* at 23. The Solicitor General also contrasts the description of the BTA standard in section 316(b) (which runs 46 words) with the statutory descriptions of the BPT, BCT, BAT, and BADT standards (which run longer).[8] On the basis of

[8] Of course, the relative brevity of statutory language does not

these distinctions, the Solicitor General maintains that EPA has broad discretion to determine whether (and, presumably, how) to employ cost-benefit analysis in setting BTA standards. *See* EPA Br. 20-23. Like the Solicitor General, UWAG does not disown Entergy's argument concerning the BAT and BADT standards. *See* UWAG Br. 14 (asserting that section 306 authorizes EPA to weigh costs and benefits). But it emphasizes what it calls "the material differences between § 316(b) and the other provisions." *Id.* at 46.

While Entergy embraces those arguments, it also advances the more far-reaching argument that EPA should be allowed to conduct cost-benefit analyses even under the BAT and BADT standards. *See* Entergy Br. 38-42. Essentially, Entergy argues that if sections 301 and 306 were rewritten by the Court to allow cost-benefit analysis, then EPA could likewise conduct such analyses under section 316(b), even if the Court finds the BTA standard more linguistically similar to the BAT and BADT standards than to the BPT and BCT standards. Entergy's argument is incorrect and would undermine the "national goal" of the Clean Water Act – *eliminating* the discharge of pollutants into the

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prevent it from expressing Congress's intention. *See, e.g.*, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 465-69 (2001) (rejecting, based largely on clear meaning of terms "public health," "adequate margin," and "requisite," industry's interpretation of 60-word provision in Clean Air Act setting forth requirements for national primary ambient air quality standards); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 339 (1994) (rejecting, based largely on provision's use of term "facility" instead of "wastestream," EPA's interpretation of household hazardous waste exemption in RCRA).

navigable waters of the United States. *See* Section 101(a)(1).

I. EPA IS NOT PERMITTED TO CONDUCT A COST-BENEFIT ANALYSIS TO ESTABLISH BAT AND BADT STANDARDS.

Entergy's contention that EPA may conduct a cost-benefit analysis in establishing BAT and BADT standards would lead to serious environmental harm. Entergy and its amici seek to expand this case involving harm to aquatic animals resulting from water intake by existing facilities – a serious environmental problem in its own right – to rewrite settled law governing pollution involving toxic chemicals and new facilities.[9] Their arguments in support of that position are entirely without merit.

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[9] As discussed below, the majority of pollutants subject to section 301's BAT standard are toxic pollutants, many of which can cause disease or death in humans at relatively low levels. In attempting to downplay the harm caused by intake structures, however, the Solicitor General and petitioners wrongly suggest that Congress considered impacts on wildlife to be comparatively unimportant. In drafting the CWA, Congress made protection of fish and other aquatic life a clear national priority. Not only does the Act establish the goal of achieving water quality levels that provide "for the protection and propagation of fish, shellfish, and wildlife," but it defines "toxic pollutant" as one that, *inter alia*, causes "death ... or physical deformations" to "any organism." Sections 101(a)(2) and 502(13). Cooling water intake structures (though they do not discharge pollutants) kill and maim fish and other aquatic animals on a daily basis.

A. The Statutory Provisions Governing BAT And BADT Do Not Permit The Use Of Cost-Benefit Analysis.

As the D.C. Circuit explained in 1978, Congress did not apply the "optimal pollution theory" when enacting the Clean Water Act. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1041 n.41 (D.C. Cir. 1978). That theory "contends that there is a level or type of pollution that, while technologically capable of being controlled, is uneconomic to treat because the benefit from treatment is small and the cost of treatment is large." *Id.* If Congress had been using the optimal pollution theory, it would have required EPA to use a strict cost-benefit analysis to set all standards under the Act because cost-benefit analysis targets an "optimal" level of pollution.[10]

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[10] Petitioners and several of their amici assert that cost-benefit analysis is the equivalent of "common sense," and note that people use it for household decisions such as buying a car. But establishing regulatory policy is not like buying a car, and cost-benefit analysis often is a difficult tool to apply to environmental standard-setting. *See* Nicholas A. Ashford & Charles C. Caldart, *The Use of Cost-Benefit Analysis as a Means of Evaluating and Designing Options for Environmental Regulation*, in *Environmental Law, Policy, and Economics* 147-69 (MIT Press 2008) (cost-benefit analysis tends to undervalue benefits, understate impacts on future generations, overvalue costs, and ignore potential for technological change). The D.C. Circuit noted in *Weyerhauser* that the optimal pollution theory is "premised on a view that we have both adequate information about the effects of pollution to set an optimal test, and adequate political and administrative flexibility to keep polluters at that level once we allow any pollution to go untreated," and concluded that Congress doubted the validity of those premises. 590 F.2d at 1041 n.41. Distinguished scholars argued in the 1970s (and continue to argue today) that reliance on quantitative analysis tends to "squeez[e] out 'soft' but crucial information merely because it seems difficult to render commensurable with the 'hard' data in the problem." Laurence Tribe, *Ways Not to Think About Plastic Trees: New Foundations*

Congress rejected the optimal pollution theory in favor of establishing the ambitious national goal that "the discharge of pollutants into the navigable waters be eliminated" in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Sections 101(a) and (a)(1). Congress enacted "stiff penalties to force each industry ... to develop the technology necessary to achieve the Act's aspiring goal." *Weyerhaeuser*, 590 F.2d at 1025. In doing so, "Congress foresaw and accepted the economic hardship, including the closing of some plants, that effluent limitations would cause." *National Crushed Stone*, 449 U.S. at 79.

Congress also anticipated – correctly, as it turns out – that the Act's strict requirements would create a strong economic incentive for industry to develop newer, cleaner technology. *See NRDC v. EPA*, 859 F.2d 156, 208-09 (D.C. Cir. 1988) (in drafting Clean Water Act, Congress had "firm conviction of need for technology-forcing measures"). To this end, the Act's technology-based standards have largely been written as performance standards; they establish a goal on the basis of what is deemed attainable

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for Environmental Law, 83 Yale L.J. 1315, 1318-19 & n.25 (1974); Lisa Heinzerling, *The Clean Air Act and the Constitution*, 20 St. Louis U. Pub. L. Rev. 121, 149 (2001) ("Cost-benefit analysis tends to underrate those things that cannot be so quantified and monetized.") Thoughtful proponents of cost-benefit analysis recognize these problems. Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. Pa. L. Rev. 1489, 1499-1500 (2002) ("Of course, it is possible that in practice, quantitative cost-benefit analysis will have excessive influence on government decisions, drowning out 'soft variables.'").

through the application of a particular technology, but they do not require the use of that technology. The regulated entity thus remains free to develop and employ a more efficient technology that attains (or exceeds) the goal at a lower cost.

1. The Statutory Language Describing The BAT And BADT Standards Disallows A Cost-Benefit Approach.

Consistent with Congress's overriding goal of eliminating the discharge of pollutants, the language of the BAT and BADT standards rejects cost-benefit analysis. The BAT standard for existing sources requires "the best available technology economically achievable for [a] category or class [of facilities], which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants." Section 301(b)(2)(A). At the same time, Congress did not ignore costs – it directed EPA, in establishing BAT standards, to include "the cost of achieving such effluent reduction" among the factors to be considered. Section 304(b)(2)(B). A straightforward reading of the BAT standard thus demonstrates that it is to be established with reference to the use of the available technology that *best* reduces or eliminates the discharge of pollutants, so long as that goal is "economically achievable." The language Congress adopted cannot reasonably bear a reading permitting the use of a cost-benefit analysis because such an analysis would result in a retreat from "the national goal of eliminating the discharge of all pollutants." Plainly, Congress did not give EPA authority to use cost-benefit considerations to override its determination to eliminate the discharge of pollutants when

technology is available to do so at a cost the industry can bear. Any doubt on this question is dispelled by section 301(b)(2)(A), which requires EPA to set the BAT standard at zero – "the elimination of all discharges of all pollutants" – where "such elimination is technologically and economically achievable." This is the language of feasibility, not cost-benefit.

The BADT standard for new sources[11] similarly mandates "the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants." Section 306(a)(1). As with the BAT standard, Congress directed EPA to consider a number of factors including "the cost of achieving such effluent reduction," but did not call for any comparison of costs with benefits. Section 304(b)(2)(B). A straightforward reading of the language of the BADT standard shows that, as with the BAT standard, Congress directed EPA to require that discharges be reduced to the level achieved by the available technology that is best at reducing or eliminating the discharge of pollution, provided the industry can afford it.[12] The language of the statute

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[11] Generally speaking, a "new source" is one that is constructed after the relevant new source standard has been promulgated. Section 306(a)(2).

[12] In practice, the BADT standards will tend to be more stringent than the BAT standards, for two reasons. First, the cost of utilizing particular technologies may be higher at existing plants than at new plants, because of the need to retrofit. Second, individual firms are authorized to seek certain variances from the BAT standards, while no such variance is

does not authorize EPA to invoke cost-benefit analysis to conclude that it is preferable to permit the discharge of a pollutant even though technology is available to prevent such discharge at a price the industry can bear.

This Court's decision in *Whitman* is instructive. The Clean Air Act ("CAA") provision at issue there, section 109(b), 42 U.S.C. § 7409(b), requires EPA to set ambient air quality standards at a level "requisite to protect the public health" with "an adequate margin of safety." Regulated entities argued that these terms could be read to allow EPA to consider implementation costs in setting such standards. In rejecting this argument, the Court found it salient that other provisions in the CAA "explicitly permitted or required economic costs to be taken into account in implementing the air quality standards," and concluded that it could not reasonably read into the statute "an authorization to consider costs that has elsewhere, and so often, been expressly granted." 531 U.S. at 471. Thus, the Court concluded, "[t]he text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance in the CAA as a whole, unambiguously bars cost considerations." *Id.* at 471.

Whitman is not an outlier case involving a "presumption" against considering costs, EPA Br. 33, or a case pertaining only to *whether*, but not *how*, costs may be considered, *see id.*[13] Nor is its reasoning

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available from the BADT standards. *See du Pont*, 430 U.S. at 137-39.

[13] Contrary to the Solicitor General's assertion, cost-benefit analysis is not a "form" or "manner" of cost consideration. EPA

limited to the precise language of CAA section 109(b). *See* Entergy Br. 28. Rather, *Whitman* is a straightforward exercise in reading a statutory provision carefully, mindful of the context in which it sits, and determining what Congress wanted. The resulting analysis applies with equal force to the Clean Water Act's BAT and BADT provisions.

Congress specified in CWA sections 304(b)(2)(B) and 306(b) that "the cost of achieving such effluent reduction" should be considered in setting BAT and BADT standards. Had Congress wanted EPA to compare costs with benefits in setting these standards, it would have said so, as it did twice elsewhere in section 304. *See* Sections 304(b)(1)(B) (directing EPA to consider "the total cost" of pollution reduction technology "in relation to the effluent reduction benefits" of such technology when setting BPT standards) and 304(b)(4)(B) (directing EPA to consider "the reasonableness of the relationship" between costs and effluent reduction benefits in setting BCT standards). Moreover, the CWA's technology-based standards, like the air quality standards at issue in *Whitman*, are "the engine that drives" the Act. 531 U.S. at 468. In such

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Br. 33. It is a different inquiry altogether. *See Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 936 (5th Cir. 1998) (*cited at* EPA Br. 39, Entergy Br. 42) ("The benefit to be achieved from adopting a particular pollution control technology is not an element of that technology's cost. ... Reinjection technology, for example, costs the same regardless of whether it reduces pollutant discharge by three million pounds per year or three pounds per year."). Entergy similarly conflates these concepts in trying to explain away this Court's holding in *Whitman*. *See* Entergy Br. 28 (noting that other provisions in the CAA allow EPA to "consider costs ... even though those provisions did not expressly provide for cost-benefit analysis").

instances, one would think that Congress was especially deliberate in choosing its words.

Nonetheless, Entergy points to the residual clause in section 304(b)(2)(B), which permits EPA to consider "such other factors as the Administrator deems appropriate" in setting BAT standards. Entergy Br. 39-40.[14] But this residual discretion does not permit the agency to interpose cost-benefit analysis – or any other policy metric of its choosing – in derogation of the choices already made by Congress. Section 304(b)(2)(B)'s residual clause is necessarily cabined by that subsection's list of "such" factors that EPA "shall" consider – namely, "the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, [and] non-water quality environmental impact (including energy requirements)." The specification of treatment "cost" (but *not* in relation to benefits), combined with the specification of "non-water quality" environmental impact (but *not* water quality impact), indicates that Congress did not intend EPA to weigh treatment costs against water quality benefits in setting BAT standards. Surely, Congress did not intend the general language of the residual clause to override the more specific terms that precede it, especially in a way that would undermine the congressional policy apparent in the use of those terms.

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[14] Other industry amici join in this argument, *see* ACC Br. 22-23, although the Solicitor General stops short of embracing it, *see* EPA Br. 24.

This Court construed a strikingly similar statutory provision in *Hughey v. United States*, 495 U.S. 411 (1990). The question in *Hughey* was whether the Victim and Witness Protection Act of 1982 allowed a court to award restitution for acts other than those underlying a criminal sentence, where the statute provided that the sentencing court "*shall* consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and *such other factors as the court deems appropriate*." *Id.* at 416-17, *quoting* 18 U.S.C. § 3580(a) (1982 ed.) (emphases added). Focusing on "the language of the statute itself," *id.* at 415, the Court determined that the explicit reference to "the offense" precluded a reading of the residual clause that would allow a sentencing judge to look beyond that offense in awarding restitution. *See id.* at 418 ("[H]ad Congress intended to permit a victim to recover for losses stemming from all conduct attributable to the defendant, ... Congress would likely have chosen language other than 'the offense' ...").[15] Furthermore, the Court held, since the enumerated items preceding the catchall phrase were designed to limit the scope of any restitution order, the canon of *ejusdem generis* required that the residual phrase not be read to expand a defendant's liability. *See id.* at 418-19. Accordingly, the Court "reject[ed] as implausible the Government's contention that the 'such other' language in § 3580(a)'s catchall phrase imports into the restitution

[15] The Court made clear that its analysis was not based on the principle of lenity extended in criminal cases. *See Id.* at 422.

provisions a wholly new substantive dimension not otherwise evident in the statute." *Id.* at 420.

Entergy's suggestion that the residual clause of section 304(b)(2)(B) be read expansively fails along the same lines. That clause may not be read to obliterate the explicit limitations articulated in the terms immediately preceding it. Rather, the residual clause is an interstitial provision designed to give EPA leeway to consider "such other" (*i.e.*, similar) factors as those enumerated. It certainly may not be read as an invitation to countermand a substantive legislative choice as to the proper risk management tool in favor of the agency's own policy preferences, for "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman*, 531 U.S. at 468. In arguing to the contrary, Entergy seeks to pull the proverbial "elephant[]" out of a "mousehole[]." *Id.* Moreover, as discussed below, permitting EPA to conduct a cost-benefit analysis in setting BAT standards would not only override Congress's determinations but also this Court's authoritative construction of the statute in *National Crushed Stone*.

2. The Structure Of The Relevant Statutory Provisions Demonstrates That The BAT And BADT Standards Are Not To Be Based On Cost-Benefit Analysis.

Like the statutory language of these provisions, the structure of the statute confirms that the BAT and BADT standards do not permit the use of a cost-benefit analysis. It is undisputed that the BAT and BADT standards are intended to be more

environmentally protective than the BPT or BCT standards. The BPT standard is more relaxed because it is largely an interim standard designed to ensure initial progress toward achievement of the ultimate elimination of pollutants required by the BAT standard. The BCT standard, added in 1977, is more relaxed because it governs only a small subset of five "conventional" pollutants – so named because they can be treated by long-available (conventional) pollution control technology – whose wholesale elimination generally is not necessary to ensure water quality.[16] The more stringent BAT standard governs the bulk of the other pollutants discharged from existing sources, including 129 chemical compounds designated as "toxic" pollutants and a host of other pollutants designated as neither "toxic" nor "conventional."[17] *See* Sections 301(b)(2)(A), (C),

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[16] The designated "conventional pollutants" (*see* Section 304(a)(4)) are not specific pollutants so much as they are aquatic *conditions* that tend to vary with the level and nature of pollution discharges. Three of the four specifically named in the statute – biological oxygen demand, total suspended solids, and pH – can be affected by a wide variety of pollutants (many of which may be separately regulated as toxic or nonconventional), and the fourth, fecal coliform, encompasses a variety of different bacteria. (EPA has since added oil and grease – another broad category – to the list.) In setting BCT standards, EPA is directed to "compare the cost and level of reduction of such pollutants" attainable by the subject industrial category with that attainable by public sewage treatment plants (as these have traditionally been the primary pollutants that such plants are designed to treat). Section 304(b)(4)(B).

[17] Although EPA and its amici contend, to varying degrees of emphasis, that BAT applies only to a small subset of highly toxic chemicals that may harm humans, this characterization is strikingly inaccurate. First, 65 chemicals (comprising 129 chemical compounds) have been designated as toxic pollutants. *See* 40 C.F.R. § 401.15. Second, as noted above, the list is not limited to chemicals that are dangerous to humans; "toxic pollutant" is defined as a substance exerting a toxic effect on

(D), & (F). The BADT standard is the most demanding because it applies to new sources of pollution, which do not face the retrofitting problems encountered at existing sources.

In short, the structure of the Act plainly requires that the BAT and BADT standards be given a more environmentally protective meaning than the BPT and BCT standards. The BPT and BCT standards direct EPA to compare costs and benefits. The BAT and BADT standards do not. The obvious conclusion is that Congress intended EPA to perform a (limited) cost-benefit analysis under the BPT and BCT standards but not under the BAT and BADT standards.

B. This Court's Decision In *National Crushed Stone* Confirms The Conclusion That The BAT And BADT Standards Do Not Permit The Use Of Cost-Benefit Analysis.

As the Second Circuit concluded, this Court's decision in *National Crushed Stone* confirms that the BAT standard does not permit the use of a cost-benefit analysis. The issue in that case was whether EPA must consider "the economic capability of an individual discharger" when deciding whether to issue a variance from the BPT requirements. 449 U.S. at 72. The Court examined "the basic structure

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"any organism." Section 502(13). Third, while an individual discharger is authorized to apply for a relaxation of the BAT standard for certain "nonconventional" (and nontoxic) pollutants, *see* Section 301(g), the BAT standard remains the presumptively applicable standard for the class of nonconventional pollutants, *see* Sections 301(b)(2)(A) & (F).

of the Act" in holding that EPA is not required to consider individual economic capability. *Id.* at 69.

The Court relied heavily on a key structural aspect of the Act – that BPT imposes less stringent requirements than BAT. Specifically, the Court wrote that, unlike BAT, "BPT limitations do not require an industrial category to commit the maximum economic resources possible to pollution control, even if affordable." *Id.* at 75. As noted previously, the Court concluded that the BPT standard required what Senator Muskie called a "'limited cost-benefit analysis,'" one that examined only whether costs are "'wholly out of proportion'" to the marginal level of pollution reduction attained. *Id.* at 71 n.10, *quoting* 118 Cong. Rec. 33,696. However, under the stricter BAT standard, the Court stated, "total cost is no longer to be considered in comparison to effluent reduction benefits." 449 U.S. at 71. A cost-benefit analysis cannot be conducted without costs being "considered in comparison to" benefits.

Despite the clarity of this language, and of the logic on which it is based, Entergy argues that *National Crushed Stone* stands for the proposition that EPA is free to use cost-benefit analysis to set the BAT standards. Entergy Br. 42. Entergy bases this contention on the Court's statement that "the BAT provision 'lists "cost" as a factor to consider in assessing BAT, although it does not state that costs shall be considered in relation to effluent reduction.'" *Id.* at 42, *quoting* 449 U.S. at 71 n.10. "In other words," Entergy opines, "Congress made cost-benefit analysis *mandatory* for BPT but only optional for BAT." *Id.* at 42. These are not simply "other words" –

they are words with a fundamentally different meaning, and they cannot be squared with this Court's opinion.

The Court in *National Crushed Stone* recognized that the BAT standard, which requires industry to commit the maximum economic resources possible to pollution control, is more protective than BPT. It credited Senator Muskie's statement that Congress intended a limited cost-benefit analysis under the BPT standard. And it concluded that Congress intended there to be no comparison of costs to benefits under the BAT standard. Entergy's suggestion that EPA may nonetheless conduct a cost-benefit analysis to determine BAT standards contravenes this Court's understanding of the structure of the Act. BAT standards would be no more protective than the corresponding BPT standards if EPA used a cost-benefit analysis to determine BAT standards. And they would be even less protective if EPA conducted a strict cost-benefit analysis to set BAT standards, as Entergy argues it may, rather than the limited cost-benefit analysis applicable under the BPT standard.

This Court authoritatively construed the BAT standard in *National Crushed Stone* and concluded that it does not permit the comparison of costs and benefits required to conduct a cost-benefit analysis. The Court's recognition of cost as a factor to be considered under the BAT standard means what the Second Circuit concluded it means – that cost must be considered, but not as part of a cost-benefit analysis.

Entergy also attempts to dismiss *National Crushed Stone* as a "pre-*Chevron*" case. Entergy Br.

41. *See generally Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). But the Court in *National Crushed Stone* determined that *Congress* had addressed how EPA is to consider costs in setting the BPT and BAT standards. Its conclusion that the BAT standard prohibits a comparison of costs and benefits leaves no gap in the statutory language for EPA to purport to fill by requiring a cost-benefit analysis. In *Chevron* terms, Congress has spoken to the issue – the statutory language leaves no room for an agency "interpretation" allowing cost-benefit analysis.[18]

The other cases cited by Entergy do not support a retreat from *National Crushed Stone*. Entergy relies on a Sixth Circuit decision, *BP Exploration & Oil, Inc. v EPA*, 66 F.3d 784 (1995), Entergy Br. 41, but the Sixth Circuit plainly erred. It based its conclusion that EPA may conduct a cost-benefit analysis in setting BAT standards on Senator Muskie's statement that Congress established a "'limited' balancing test," 66 F.3d at 796, a statement that was made with respect to the BPT standard, not the BAT standard. As this Court held in *National*

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[18] The Solicitor General appears to suggest that a statute should be considered "silent" or "ambiguous" on a topic if it does not address that topic *in so many words*. EPA Br. 12 The function of the *Chevron* inquiry, however, is to determine the meaning of the words Congress *does* use. This Court has made clear that, under the first step of the *Chevron* analysis, it is important to review statutory language in context and not in isolation. *See, e.g., NAHB v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) ("[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (quotation marks omitted)). In *National Crushed Stone* the Court did just that, examining "the basic structure of the Act" to conclude that the BPT standard requires a cost-benefit analysis and the BAT standard does not permit one. 449 U.S. at 69.

Crushed Stone, the BAT standard is more environmentally protective than the BPT standard and does not call for a comparison of costs and benefits, but instead for the achievement of the goals established by Congress.[19]

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[19] In a footnote, Entergy cites a handful of decisions from lower courts in support of the statement that "no court has ever held that [a cost-benefit] analysis is forbidden" in setting BAT standards. Entergy Br. 41 & n. 18. To the contrary, in one of those cases the court rejected an industry petitioner's argument that certain BAT regulations were faulty because of EPA's failure to weigh costs against benefits, noting that "[t]he conspicuous absence of the comparative language contained in section 304(b)(1)(B) leads us to the conclusion that Congress did not intend the Agency or this court to engage in marginal cost-benefit comparisons" in setting BAT standards. *Association of Pacific Fisheries v. EPA,* 615 F.2d 794, 818 (9th Cir. 1980). Although the court also noted later that the benefits of the regulations "justified the costs," it is clear that the court was simply confirming that the effluent reduction benefit was not *de minimis. See id.* (The *de minimis* principle is discussed more fully below.) In another of the cases Entergy cites, the court concluded that "Senator Muskie intended that the type of assessment [used in setting BAT standards] should be basically the same [as the BPT determination], *except that there should be no cost-benefit analysis.*" *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1051 (3d Cir. 1975) (emphasis added). No court has squarely held, after this Court's decision in *National Crushed Stone*, that EPA is permitted to conduct a cost-benefit analysis in setting BAT or BADT standards, other than the Sixth Circuit in the flawed *BP Exploration* decision. And while, as Entergy notes, the Fifth Circuit upheld a BAT standard against an industry challenge to the manner in which EPA had weighed pollution reduction benefits against costs, the court concluded that this cost-benefit exercise had been irrelevant to the BAT determination. *See Texas Oil*, 161 F.3d at 936 ("Whatever value such benefit estimates may have, they are not a required part of the BAT determination."). If the court had viewed this as a *permissible* exercise in setting BAT standards, surely it would have evaluated the substance of the agency's cost-benefit comparison in response to industry's "arbitrary or capricious" challenge.

As did the Sixth Circuit in *BP Exploration*, Entergy also relies on the D.C. Circuit's decision in *Weyerhauser*. *See* Entergy Br. 39-40. That case, which includes a thoughtful discussion of the legislative history of the 1972 Act, offers no solace to Entergy. As discussed above, the *Weyerhauser* court observed that Congress had *rejected* the "optimum pollution" theory and its reliance on cost-benefit analysis. Thus, while the interim BPT standard requires a limited balancing of costs and benefits, in the more stringent BAT standard "[a]ll factors, including costs and benefits, are consideration factors, and no factors are separated out for comparison." *Weyerhauser*, 590 F.2d at 1045.

When the *Weyerhauser* court speaks here of "benefits," it refers not to the *in-stream water quality* benefits of applying such technology (as Entergy would have it), but simply to the degree of pollutant reduction attained (*i.e.*, how well the technology *works*). *See id.* at 1044 n.49 ("The phrase 'effluent reduction benefits' avoids any suggestion that receiving water quality is an issue. Effluent reduction occurs whenever less effluent is discharged ... and the same degree of reduction occurs whether the discharge is into a small stream or the Pacific Ocean."). In fact, the primary holding in *Weyerhauser* is that Congress "intended to exclude consideration of receiving water quality completely" in crafting the Act's technology-based standards.[20] *Id.* at 1053 n.68;

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[20] "In only *one limited instance*, *thermal pollution*, is receiving water capacity to be considered in relaxing [technology-based] standards, and the section allowing such consideration was drafted as *a clear exception*." *Id.* at 1043 (referencing CWA section 316(a) (emphases added)). It is telling that the *Weyerhauser* court did not include section 316(b) in this statement.

id. at 1041-44 (EPA, in setting BPT standards, is *forbidden* from considering water quality benefits).[21] Further, as the D.C. Circuit noted, in 1977 Congress specifically considered whether to "rewrite" the BAT requirement "in order to continue the cost-benefit balancing" done under BPT, but decided instead to retain the original formulation, under which BAT does not include cost-benefit balancing. *Id.* at 1046.[22] Indeed, as Senator Muskie noted at the time, Congress added the BCT standard to the Act in 1977, thus permitting a cost-benefit balancing for designated conventional pollutants, precisely because the BAT standard is "not subject to ... any form of cost-benefit analysis." 3 Legislative History of the Clean Water Act of 1977, at 427 (1975).[23]

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[21] This answers UWAG's assertion that "until *Riverkeeper II*, no court had suggested that Congress intended to bar EPA from considering water quality in setting discharge controls." UWAG Br. 46. Of course, a source is ultimately required to meet a discharge limit *more stringent* than the applicable technology-based standard if that is necessary to attain in-stream water quality standards. *See* Section 301(b)(1)(C).

[22] To the extent that any loose language in *Weyerhauser* might be read to suggest in *dicta* that EPA may perform a cost-benefit analysis in establishing BAT standards, such statements must give way to this Court's later authoritative analysis in *National Crushed Stone*.

[23] ACC cites several additional cases for the proposition that BAT allows a full cost-benefit analysis, ACC Br. 22-23, but none supports this position. Two of those cases, *Chemical Mfrs. Ass'n*, 870 F.2d at 204, 207, and *Our Children's Earth Found. v. EPA*, 527 F.3d 842, 849 n.5 (9th Cir. 2008), involved the BPT (not BAT) standard, under which (as all parties agree) a certain form of balancing costs and benefits is allowed. Three others, *American Petroleum Inst. v. EPA*, 787 F.2d 965, 972 (5th Cir. 1986), *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 194 n.22 (2d Cir. 2004), and *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 516 (2d Cir. 2005), involved an application of the *de minimis* principle and did not endorse the use of cost-benefit analysis in setting the BAT standard. The final case, *NRDC v. EPA*, 863

With regard to the BADT standard, all agree that it is to be at least as environmentally protective as the BAT standard. *See, e.g.*, Entergy Br. 40 n.16, *quoting American Iron*, 526 F.2d at 1059 (referring to "a 'virtually identical' structure for BADT standards under §306"). Accordingly, the reference to the "cost of achieving such effluent reduction" in section 306(b)(1)(B), like the similar reference to cost under the BAT standard, permits EPA to consider whether the industry can bear the costs at issue and whether less costly methods can produce essentially the same environmental results – but does not permit the use of a cost-benefit analysis.[24]

F.2d 1420 (9th Cir. 1988), says outright that "BAT should represent 'a commitment of the *maximum resources economically possible* to the ultimate goal of eliminating all polluting discharges,'" *id.* at 1426, *quoting National Crushed Stone*, 449 U.S. at 74) (emphasis added), and "'the *greatest attainable level* of effluent reduction which *could be achieved*,'" *id.* at 1431, *quoting NRDC v. EPA*, 822 F.2d 104, 115 n.12 (D.C. Cir. 1987) (emphasis added), which is the language of feasibility, not cost-benefit analysis.

[24] Entergy's reliance on *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), which involved the interplay between state nuisance law and the CWA, is misplaced. *See* Entergy Br. 40-41 n.17. The Court there determined that a "downstream" state's nuisance law may not be invoked to upset any "weighing of the costs and benefits" conducted in setting technology-based or water quality-based effluent limits in the source state's discharge permits. *See Ouellette*, 479 U.S. at 494-96 (citing Sections 304, 302). The Court did not hold, however, that every permit limit devolves from a cost-benefit analysis. Obviously, *Congress* "weighs costs and benefits" in a holistic sense when it specifies which technology-based standards should apply to certain classes of dischargers, even where the standards it chooses do not *themselves* involve a cost-benefit analysis. EPA's establishment of *some* technology-based and water-quality based effluent limits may involve a "weighing of costs and

II. THE SECTION 301 AND SECTION 306 STANDARDS (INCLUDING BTA REQUIREMENTS) ARE TO BE ESTABLISHED FOR CLASSES AND CATEGORIES OF DISCHARGERS.

Petitioners and some amici argue that section 316(b) should be implemented on a case-by-case basis rather than by means of categorical regulations. *See, e.g.*, Entergy Br. 46-47. Unquestionably, each facility has its own set of site-specific physical and technological characteristics, and each facility owner has its own set of financial capabilities and constraints. Congress thus could have directed EPA to set the Act's various technology-based limitations on a site-by-site basis. Instead, the CWA directs that the BAT, BCT, and BADT limitations be established for "categories" of point sources. Sections 301(b)(2)(A) & (b)(2)(E); 306(b)(1)(A) & (b)(1)(B). EPA took a similar categorical approach to the establishment of the BPT limitations, and the Court held in *du Pont* that this approach is consistent with the language, structure, and history of the statute. *See*, 430 U.S. at 129 ("In sum, the language of the statute supports the view

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benefits," but only where Congress has *explicitly* permitted this analysis (as it did for BPT and BCT, but not BAT or BADT). *See also* Section 302(b)(2)(A) (modification of EPA water-quality based effluent limit allowed where permittee shows "no reasonable relationship between the economic and social costs and the benefits to be obtained"). And a source state may permissibly "weigh costs and benefits" in setting permit terms based on state law, so long as those terms are *more stringent* than what federal law requires. *See* Section 510(1). (For this last reason, a state's application of its nuisance law against its own water pollution sources is *not* preempted by the CWA.)

that § 301 limitations are to be adopted by the Administrator, that they are to be based primarily on classes and categories, and that they are to take the form of regulations.").

Section 316(b) mandates that "[a]ny standard established pursuant to section 1311 of this title or section 1316 of this title [CWA sections 301 or 306] ... shall require" BTA for cooling water intake. In other words, the section 316(b) BTA requirements are to be established *as part of* the section 301 and section 306 standards, and thus are to be "based primarily on classes and categories," and to "take the form of regulations," as well. Indeed, in *du Pont* the Court relied, in part, on section 316(b)'s use of the term "'standard'" in holding that Congress intended EPA to promulgate categorical effluent limitations for existing sources under section 301. 430 U.S. at 133 n.24. The contention that section 316(b) must be implemented on a case-by-case basis thus cannot be squared either with the plain language of the statute or with this Court's analysis in *du Pont*.

Moreover, as the Court noted in *du Pont*, a case-by-case approach "would place an impossible burden on EPA," requiring the agency "to give individual consideration" to each of the numerous facilities to be regulated across the country, and would unseasonably delay the issuance of the required restrictions. 430 U.S. at 132-33. A case-by-case approach would also countermand the general congressional mandate to "'assure that similar point sources with similar characteristics ...will meet similar effluent limitations'" insofar as possible, both to prevent a 'race to the bottom' among states eager to attract business and as a matter of basic fairness.

NRDC v. Train, 510 F.2d 692, 709-10 (D.C. Cir. 1974) (quoting Senator Muskie). Thus, as noted by Senator Muskie in the debates over the 1972 Act, Congress chose "to avoid imposing on the Administrator any requirement to consider the location of sources within a category ... ." *Weyerhaeuser*, 590 F.2d at 1045 n.52 (citation omitted).

III. THERE IS AMPLE ROOM UNDER THE STATUTE FOR EPA TO AVOID TRULY ABSURD RESULTS.

Interspersed throughout the briefs of petitioners and their amici are variations of the following argument: if cost-benefit analysis is not used for regulatory decision-making, absurd policy results will ensue. The short answer to this argument, of course, is that the Constitution assigns Congress the job of policy-making, and Congress is free to select policy alternatives with which some or all of the parties to this case may vehemently disagree. Moreover, the Clean Water Act's technology-based standards do not leave industry (or the environment) prey to truly absurd results. As the Court noted in *du Pont*, the use of national categorical standards necessitates that variances be available for individual facilities at which the relevant technological features are fundamentally different from those on which the (technology-based) standards were established.[25] *See* 430 U.S. at 128. Further, delays in the implementation of the BAT and BCT standards are available for firms choosing

[25] EPA had promulgated such a variance for the BPT standard by regulation, and Congress has since added such a variance for the BCT and BAT standards. *See* Section 301(n).

to develop innovative technologies for meeting them, *see* Section 301(k), and firms may seek relaxation of the BAT standard for nonconventional pollutants on cost or water quality grounds, *see* Sections 301(c) & (g).

Finally, EPA need not require costly effluent reductions (or cooling water intake adjustments) where the real-world benefit will be no more than *de minimis*. *See*, *e.g.*, *Association of Pacific Fisheries*, 615 F.2d at 818. However, this does not permit the agency to impose a cost-benefit framework in derogation of congressional policy. As the D.C. Circuit has noted:

> Unless Congress has been extraordinarily rigid, there is likely a basis for an implication of de minimis authority to provide exemption when the burdens of regulation yield a gain of trivial or no value. That implied authority is not available for a situation where the regulatory function does provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs. For such a situation any implied authority to make cost-benefit decisions must be based not on a general doctrine but on a fair reading of the specific statute, its aims and legislative history.

Alabama Power Co. v. Costle, 636 F.2d 323, 360-61 (D.C. Cir. 1979) (discussing the CAA).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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